

Insolvency Law Committee's Annual Review of 2004 Legislative Developments

by Michael Koch

Fraudulent Transfers. Senate Bill 1408, passed by the Senate April 22, 2004, passed the Assembly June 7, 2004, and was approved by the Governor June 17, 2004. Existing law sets forth the conditions under which a transfer made or obligation incurred by a debtor is fraudulent as to a creditor. Civil Code Section 3439.04 has been amended to set forth various factors that may be considered in determining that such a transfer or obligation is fraudulent. These changes are declaratory of existing laws and not intended to affect any judicial decision interpreting the existing law. In determining actual intent of the debtor to hinder, delay, or defraud any creditors, consideration may be given, among other factors, to:

1. Whether the transfer or obligation was to an insider;
- (2) Whether the debtor retained possession or control of the property transferred;
- (3) Whether the transfer or obligation was disclosed;
- (4) Whether before the transfer the debtor had been sued or threatened with suit;
- (5) Whether the transfer was of substantially all of the Debtor's assets;
- (6) Whether the debtor absconded;
- (7) Whether the debtor removed or concealed assets;
- (8) Whether the debtor received fair value;
- (9) Whether the debtor was insolvent;
- (10) Whether the transfer occurred shortly before or after a substantial debt was incurred;
- (11) Whether the debtor transferred the essential assets of the business to a lien holder who transferred the assets to an insider of the debtor.

[Note: this bill was originally proposed by the Insolvency Law Committee.]

Tax Amnesty Program. Senate Bill 1100, passed the Assembly July 28, 2004, passed the Senate July 29, 2004, and was approved by the Governor August 16, 2004. The bill establishes a limited amnesty program for tax liabilities due and payable for tax reporting periods beginning before January 1, 2003. Penalties imposed for non-reporting,

underreporting or nonpayment of tax liabilities can be waived. The program will be conducted for a two month period beginning February 1, 2005, through March 31, 2005. Participants must complete an amnesty application and file completed tax returns for all reporting period involved. The taxpayer must pay in full the taxes and interest due or apply for an installment payment agreement. If the payer has filed for bankruptcy protection under Title 11 of the United State Code, an order from the Bankruptcy Court allowing the taxpayer to participate in the amnesty program will be required.

Foreclosures. Senate Bill 1277 passed by the Assembly July 1, 2004, passed by the Senate July, 12, 2004, and approved by the Governor July 19, 2004. Persons recording a notice of default of a mortgage or deed of trust to perform specified actions, Civil Code Section 2924b has been amended to specify that those actions apply to the recording of a notice of default or sale, and define who is authorized to make those recordings. Additionally, this new law bill enacts consumer-oriented restrictions on the growing practice of companies who charge a substantial fee (25 to 50 percent of the recovery) for assisting homeowners in obtaining surplus funds after a foreclosure sale.

A "foreclosure consultant" is now defined as any person who assists the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, trustee, the remaining proceeds from the foreclosure sale of the owner's residence. A foreclosure consultant who is contracting to assist the homeowner recover surplus funds (1) provide notice to the homeowner that the homeowner is entitled to receive the surplus funds without paying a fee to a third party and that no contract for assistance obtaining surplus funds may be entered into until 65 days after the date of the foreclosure sale, and (2) obtain from the homeowner a notarized acknowledgment of receipt of the notice. A trustee, beneficiary or counsel to the trustee or beneficiary is not liable for providing to anyone the information set forth in the newly required notice or a copy of the newly required notice.